IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-726

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, Et Al., - - - - - - - - - - Petitioners

versus

CITY OF EVANSVILLE, INDIANA, Et Al., - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FRED S. WHITE
BAMBERGER, FOREMAN, OSWALD & HAHN
708 Hulman Building
Evansville, Indiana 47708
Telephone: (812) 425-1591

ROBERT G. BREETZ
STITES, McELWAIN & FOWLER
3400 First National Tower
Louisville, Kentucky 40202
Telephone: (502) 587-3400

Attorneys for Petitioner, Louisville and Jefferson County Metropolitan Sewer District

EDWARD M. STEUTERMANN
WOOD, GOLDBERG AND PEDLEY
2800 First National Tower
Louisville, Kentucky 40202
Telephone: (502) 589-4440

Attorneys for Petitioners, Kentucky Liquid Recycling, Inc., Donald Eugene Distler, Charles W. Horn, Jr., and Joseph Alfred Hess, Jr.

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, ET AL. - *Petitioners*

v.

CITY OF EVANSVILLE, INDIANA, ET AL. - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit in *City of Evansville, Indiana, et al.* v. *Kentucky Liquid Recycling, Inc., et al.*, No. 78-1578, entered August 9, 1979.

OPINIONS BELOW

The decision and judgment of the Court of Appeals is not yet reported. It is reprinted as Appendix B. The decision and judgment of the United States District Court for the Southern District of Indiana, entered on March 7, 1978 and March 23, 1978, respectively, are not reported, and are reprinted as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1979. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Should the application of the federal common law of nuisance be expanded to permit municipalities, representing local pecuniary interests rather than state governmental interests, to invoke the jurisdiction of the federal courts to pursue claims for money damages allegedly sustained as a result of the pollution of a navigable interstate waterway?

STATUTORY PROVISIONS INVOLVED

This case involves the federal common law of nuisance, the federal question statute, 28 U.S.C. § 1331(a) and the diversity statute, § 1332(a).

28 U.S.C. § 1331(a) provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 1332(a) provides:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between: (1) citizens of different States; (2) citizens of a State, and foreign states or citizens or subjects thereof; and (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

STATEMENT OF THE CASE

The jurisdiction of the United States District Court was invoked pursuant to 28 U.S.C. § 1331, 33 U.S.C. § 1251, *et seq.* and 42 U.S.C. § 300f, *et seq.* The United States District Court dismissed the complaint for lack of subject matter jurisdiction, and on appeal, the Court of Appeals reversed the dismissal order, in part, holding that the plaintiffs stated a claim for relief under the federal common law of nuisance and that the District Court had jurisdiction pursuant to 28 U.S.C. § 1331, the federal question statute.

On July 13, 1977, the Respondents, City of Evansville, Indiana, City of Mt. Vernon, Indiana, and The Waterworks Department of the Waterworks District of the City of Evansville (hereinafter "Cities") filed a class action complaint seeking money damages for expenses allegedly incurred by them as a result of the discharge of pollutants into the Ohio River. In their complaint, Cities purported to represent all cities and towns situated along the Ohio River between Louisville, Kentucky and Cairo, Illinois. The complaint alleged that the Petitioners, Louisville and Jefferson County Metropolitan Sewer District (hereinafter

"MSD"), Kentucky Liquid Recycling, Inc. (hereinafter "KLR"), Donald Eugene Distler (hereinafter "Distler"), Charles W. Horn, Jr. (hereinafter "Horn"), and Joseph Alfred Hess, Jr. (hereinafter "Hess"), intentionally and unlawfully discharged highly toxic chemicals, pollutants and refuse into the Ohio River commencing in March, 1977, thereby necessitating additional water purification treatment for all cities and towns downstream from Louisville, Kentucky that drew their drinking water from the River. Although the complaint alleged, *inter alia,* that a nuisance had been created, no equitable relief was sought, and it was later conceded by Cities that the alleged nuisance had been abated prior to the filing of their complaint in July, 1977.

On September 20, 1977, Cities filed an amended complaint, which, like the original, was in eight counts. In addition to attempting to proceed under the federal common law of nuisance, Cities also based their complaint on the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.,* the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 *et seq.,* and the Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.* Further, state common law claims were alleged under the theory of pendant jurisdiction. On October 20, 1977, MSD filed its Motion to Dismiss Plaintiffs' Amended Complaint pursuant to Rule 12(b)(1), (2) and (3) of the Federal Rules of Civil Procedure. The issues were briefed, and on March 7, 1978, the United States District Court dismissed, without prejudice, all of the federal claims for lack of subject matter jurisdiction. Further, since

there was incomplete diversity of citizenship (petitioner Hess is an Indiana citizen) and no other basis for federal jurisdiction, the other claims based upon pendant jurisdiction were also dismissed. Upon the refusal of Cities to file a second amended complaint, the dismissal order was made final on March 23, 1978.

On appeal, the Court of Appeals upheld the dismissal order as to all counts of the amended complaint except the count alleging a claim for relief based upon the federal common law of nuisance. The Court of Appeals held that Cities had stated a claim for relief under the federal common law of nuisance and that the District Court had jurisdiction pursuant to the federal question statute, 28 U.S.C. § 1331. Accordingly, the cause was remanded to the District Court for further proceedings consistent with the Court's decision. This Petition for Writ of Certiorari is directed to the August 9, 1979 decision and judgment of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals authorizes municipalities and public corporations to pursue an action in a federal district court based upon the federal common law of nuisance wherein the only relief sought is compensatory and punitive damages. Some of the legal principles announced by the Court of Appeals in support of its decision have been rejected in similar cases by other Circuits, and the decision raises significant new questions of law which should be decided by this Court.

In *Illinois* v. *Milwaukee,* 406 U. S. 91, 92 S. Ct. 1385, 31 L. Ed. 712 (1972), this Court fashioned the federal common law of nuisance, thereby permitting the State of Illinois to file a suit in federal district court to abate a nuisance arising out of the pollution of an interstate navigable waterway. There is absolutely no language in *Illinois* v. *Milwaukee, supra,* evidencing the intent of this Court to apply the doctrine to cases other than those involving State plaintiffs seeking equitable relief to abate interstate water pollution. Clearly, this Court found it significant that the plaintiff was the State of Illinois seeking to protect and uphold State interests. Mr. Justice Douglas cited with approval the following language from *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907):

> " 'The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in Missouri v. Illinois, 200 U. S. 496, 520, 521, 50 L. Ed. 572, 578, 579, 26 Sup. Ct. Rep. 268. But it is plain that some such demands must be recognized, if the grounds alleged are proved. *When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests;* and the alternative to force is a suit in this Court. Missouri v. Illinois, 180 U. S. 208, 241, 45 L. Ed. 497, 512, 21 Sup. Ct. Rep. 331.' 206 U. S., at 237, 27 S. Ct., at 619." (Our emphasis)

406 U. S. at 105, 92 S. Ct. at 1393. Mr. Justice Douglas also adopted the following citation from *Georgia* v. *Tennessee Copper Co., supra:*

> " 'It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. *If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law.' Id.,* at 238, 27 S. Ct., at 619." (Our emphasis)

406 U. S. at 105, 106, 92 S. Ct. at 1393. The above citations taken from *Georgia* v. *Tennessee Copper Co., supra,* certainly reflect this Court's concern for the dilemma encountered by States attempting to abate interstate water pollution. Private individuals, on the other hand, providing diversity exists, have always had a legal remedy for damages available to them in a federal district court with jurisdiction based upon 28 U.S.C. § 1332. Further, political subdivisions of a State, such as Cities in the instant case, being "citizens" for diversity purposes have the same remedies as those available to individuals, and the Court so recognized this fact in *Illinois* v. *Milwaukee, supra,* stating:

> "That being the case, a political subdivision in one State would be able to bring an action founded upon diversity jurisdiction against a political subdivision of another State."

406 U. S. at 99, 92 S. Ct. at 1390. In addition to the fact that a State plaintiff was involved in *Illinois* v. *Milwaukee,* other considerations combined to persuade this Court to recognize a federal common law remedy:

> "Thus, it is not only the character of the parties that requires us to apply federal law. See Georgia v. Tennessee Copper Co., ... [W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law . . . ."

406 U. S. at 106, n. 6, 92 S. Ct. at 1393, n. 6. This Court concluded that the federal interests present in interstate water pollution were identical to those found, for example, in disputes between States involving the equitable apportionment of interstate streams and boundaries, and it therefore held that federal common law should be applied. *Illinois* v. *Milwaukee,* 406 U. S. 91, 104, 105, 106, 92 S. Ct. 1385, 1393, 1394.

Virtually all of the decisions analyzed by this Court in *Illinois* v. *Milwaukee, supra,* involved State plaintiffs asserting sovereign interests, and the relief sought in those cases was equitable in nature. In concluding its decision, this Court observed:

> "Thus, a *State* with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor. There are no fixed rules that govern; *these will be equity suits in which the informed judgment of the chancellor will largely govern.*" (Our emphasis)

406 U. S. at 108, 109, 92 S. Ct. at 1395.

Since *Illinois* v. *Milwaukee,* federal courts have been reluctant to extend the doctrine of the federal common law of nuisance beyond cases presenting the factual situation described by this Court in its decision. Some courts have permitted the federal government to proceed under the federal common law theory. See, for example, *United States* v. *Ira S. Bushey & Sons, Inc.,* 363 F. Supp. 110 (D. Vt. 1973), *aff'd,* 487 F. 2d 1393 (2d Cir. 1973), *cert. denied,* 417 U. S. 976, 94 S. Ct. 3182, 41 L. Ed. 2d 1146 (1974); *United States* v. *Stoeco Homes, Inc.,* 498 F. 2d 597 (3d Cir. 1974), *cert. denied,* 420 U. S. 927, 95 S. Ct. 1124, 43 L. Ed. 2d 397 (1975). The Seventh Circuit extended the doctrine to a State agency in *Stream Pollution Control Board of the State of Indiana* v. *United States Steel Corp.,* 512 F. 2d 1036 (7th Cir. 1975). However, none of the above decisions constituted a significant departure from the rationale announced by this Court in *Illinois* v. *Milwaukee, supra,* because in each of those cases, state or federal sovereign interests were being asserted and the relief sought was equitable in nature. The Fourth Circuit declined to extend the application of the doctrine in a case involving private plaintiffs in an intrastate pollution controversy. See *Committee for the Consideration of the Jones Falls Sewage System* v.

Train, 539 F. 2d 1006 (4th Cir. 1976). In *Parsell* v. *Shell Oil Co.,* 421 F. Supp. 1275 (D. Conn. 1976), *aff'd mem. sub nom., East End Yacht Club* v. *Shell Oil Co.,* 573 F. 2d 1289 (2d Cir. 1977), a case involving private plaintiffs seeking money damages in an intrastate pollution dispute, the court refused to apply the federal common law of nuisance. The Court, relying upon *Illinois* v. *Milwaukee, supra,* noted the absence of three important factors which were necessary to justify the application of the doctrine: first, the absence of a State plaintiff; secondly, the pollution was not interstate in nature; and thirdly, the prayer was for money damages as opposed to equitable relief. 421 F. Supp. 1275, 1280-1282. With respect to the prayer for money damages, the Court noted:

> "Part of the reason why the Supreme Court encouraged the development of the federal common law of water pollution in *Milwaukee* was the need for resolution of intricate and highly important questions of the appropriate water quality standards to apply. As the Court said, 'These will be equity suits in which the informed judgment of the chancellor will largely govern.' 406 U. S. at 107-108, 92 S. Ct. at 1395. A jury awarding damages in an oil spill case with wholly intrastate impact would be contributing to the development of evolving water quality standards only in the most *ad hoc* way."

Parsell v. *Shell Oil Co., supra,* 421 F. Supp. at 1281-1282.

Thus, with few exceptions, the application of the federal common law of nuisance ". . . has not been

extended beyond the abatement of public nuisances in interstate controversies where the complainant is a state and the offenders are creating extra-territorial harm." *Committee for the Consideration of the Jones Falls Sewage System* v. *Train, supra,* 539 F. 2d at 1009.

In the instant case, the Court of Appeals exhibited virtually no hesitation or concern about extending the application of the doctrine of the federal common law of nuisance to municipalities, stating:

> "The plaintiffs are municipal or public corporations, subdivisions of the state, that were required to spend public funds because of pollution of an interstate waterway by acts done in another state. The interests of the state in this interstate pollution dispute are implicated in the same way such interests were implicated in *Illinois* v. *Milwaukee.*"
> (Footnote omitted)

Appendix B, Page 24a (hereinafter cited as "App. —, p. —"). Obviously, the Court of Appeals declined to seriously consider the extensive analysis by this Court in *Illinois* v. *Milwaukee, supra,* explaining the necessity for a federal equitable remedy for States seeking to abate interstate water pollution. More specifically, the Court of Appeals failed to recognize that individuals, as well as public or private corporations and municipalities, had a legal remedy for damages in a federal district court of competent jurisdiction pursuant to 28 U.S.C. § 1332, long before this Court's decision in *Illinois* v. *Milwaukee.* The case at bar constitutes nothing more than an action at law wherein the plaintiffs have requested a jury and seek to recover

compensatory and punitive damages for expenses incurred by them as a result of the alleged commission of a tort. The equitable remedy which resulted from this Court's decision in *Illinois* v. *Milwaukee* was created for the purpose of abating interstate water pollution, and as the Court in *Parsell* v. *Shell Oil Co., supra,* observed:

> "It will take a clearer indication than the opinion in *Illinois* v. *Milwaukee* to persuade me that the Supreme Court intends federal jurisdiction for a common law claim to be available for every incident of pollution involving navigable waters."

421 F. Supp. at 1281.

Even if the Court of Appeals was correct in deciding that a municipality should be allowed to invoke the district court's jurisdiction pursuant to the federal common law of nuisance, there is no justification for expanding the remedy available under the doctrine to include the recovery of compensatory and punitive damages. The Court of Appeals reasoned that if a municipality was a proper party to pursue a claim under the federal common law of nuisance, then the nature of the remedy sought had nothing to do with determining whether or not a federal court had jurisdiction over the claim. (App. B, pp. 26a-27a) Again, the Court of Appeals failed to recognize that it was the necessity of an equitable remedy that gave rise to the creation of the doctrine of federal common law of nuisance in the first instance in *Illinois* v. *Milwaukee:*

> "The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress.

> Yet the remedies which Congress provides are not necessarily the only federal remedies available. 'It is not uncommon for federal courts to fashion law where federal rights are concerned.' " (Citation omitted)

406 U. S. at 103, 92 S. Ct. at 1392. This Court permitted the State of Illinois to pursue an action in federal district court to abate interstate water pollution under the federal common law of nuisance because the controversy touched upon "basic interests of federalism" and because of the "federal interest in the need for a uniform rule of decision." 406 U. S. at 105, n. 6, 92 S. Ct. 1393-1394, n. 6. Can it be said that the instant case involves a controversy which touches upon basic interests of federalism or presents a federal need for a uniform rule of decision? It is respectfully submitted that this question must be answered in the negative. Whether or not Cities recover money damages for a tort arising out of the use of an interstate navigable waterway does not involve federal interests any more than those which would be found in a controversy involving a tort arising out of the use of an interstate highway. In the past, 28 U.S.C. § 1332 has sufficiently provided all citizens, including municipalities, with a basis for invoking federal jurisdiction over tort claims, and the case at bar presents no legitimate or compelling reason to expand the jurisdiction of federal district courts.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and decision of the Seventh Circuit.

Respectfully submitted,

FRED S. WHITE
BAMBERGER, FOREMAN, OSWALD & HAHN
708 Hulman Building
Evansville, Indiana 47708
Telephone: (812) 425-1591

ROBERT G. BREETZ
STITES, MCELWAIN & FOWLER
3400 First National Tower
Louisville, Kentucky 40202
Telephone: (502) 587-3400

Attorneys for Petitioner, Louisville and Jefferson County Metropolitan Sewer District

EDWARD M. STEUTERMANN
WOOD, GOLDBERG AND PEDLEY
2800 First National Tower
Louisville, Kentucky 40202
Telephone: (502) 589-4440

Attorneys for Petitioners, Kentucky Liquid Recycling, Inc., Donald Eugene Distler, Charles W. Horn, Jr., and Joseph Alfred Hess, Jr.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

CITY OF EVANSVILLE, INDIANA et al

v.

KENTUCKY LIQUID RECYCLING, INC., et al

No. EV 77-76-C

ENTRY

This cause comes before the Court on the motion to dismiss of defendant Louisville and Jefferson County Metropolitan Sewer District ("MSD") and on the Court's own motion pursuant to 28 U.S.C., Federal Rules of Civil Procedure, Rule 12(h)(3), as to the other defendants, Kentucky Liquid Recycling, Inc. ("KLR"), Donald Eugene Distler ("Distler"), Charles W. Horn, Jr. ("Horn") and Joseph Alfred Hess, Jr. ("Hess"). The Court, being duly advised in the premises does now submit its ruling.

Plaintiffs' amended complaint in this action contains seven numbered counts, three of which proceed on statutory theories (counts two, six and seven) and four of which proceed on common law theories (counts one, three, four and five). Plaintiffs also make reference to a fourth statutory theory in their complaint, but not within a numbered count.

I
Statutory Theories

A
Count Two

In this count, plaintiffs assert a cause of action based on 46 U.S.C. §740. That statute extends the admiralty and

maritime jurisdiction of the United States to include "all cases of damage or injury, to person or property, caused by a vessel on navigable water notwithstanding that such damage or injury be done or consummated on land." There being no allegation, or even suggestion, that any damage in this action was "caused by a vessel on navigable water," that statute does not extend jurisdiction of this Court to include any claim of plaintiffs based on that statute. Therefore, the Court lacks subject matter jurisdiction over count two of plaintiffs' amended complaint.

B

Count six

By this count, plaintiffs assert a cause of action based on 33 U.S.C. §407. That statute does not give rise to a private cause of action based upon its violation, notwithstanding that such violation may arguably be established in a common law action to show, for example, negligence on the part of defendants. As there exists no private right of action under 33 U.S.C. §407, this Court lacks subject matter jurisdiction over count six of the amended complaint.

C

Count seven

The claims asserted in this count are based upon the Safe Drinking Water Act, 42 U.S.C. §300f, et seq. Civil actions under that Act are authorized at 42 U.S.C. §300j-8 (a). However, such civil actions are subject to the sixty-day notice requirement of 42 U.S.C. §300j-8(b). Compliance with that requirement is a jurisdictional prerequisite to the bringing of an action under 42 U.S.C. §300j-8(a). Plaintiffs have not alleged compliance with 42 U.S.C. §300j-8(b).

Plaintiffs, however, seek to avoid operation of that limitation by asserting that their action is brought under

28 U.S.C., §1331, and that this Court has jurisdiction over this claim because of the "Savings Clause" at 42 U.S.C. §300j-8(e). That "Savings Clause" acknowledges that the right of action at 42 U.S.C. §300j-8(a) exists in addition to all other rights of action the person bringing such action may have, but does so in the sense of non-pre-emption in this area of the law. Nothing in 42 U.S.C. §300j-8(e) can be construed to authorize an action under 42 U.S.C. §300j-8(a) being brought without compliance with the requirements of 42 U.S.C. §300j-8(b). The general Federal Question Jurisdiction statute, 28 U.S.C. §1331, does not give this Court jurisdiction over the claims in count seven of plaintiffs amended complaint. As the amended complaint herein fails to allege any compliance with 42 U.S.C. §300j-8(b), it appears that the Court lacks subject-matter jurisdiction over the claims in count seven of plaintiffs amended complaint.

D

33 U.S.C. §1251, et seq.

Though not contained in a numbered count, the amended complaint herein refers to a claim under 33 U.S.C. §1251, et seq. To the extent that plaintiffs thereby seek to assert a claim based thereon, the Court shall review its jurisdiction to adjudicate any such claim.

The analysis in part I-C of this Entry (immediately preceding) applies with equal force here. A private right of action under 33 U.S.C. §1251, et seq. is authorized by 33 U.S.C. §1365(a), and the jurisdictional sixty-day notice requirement appears at 33 U.S.C. §1365(b). Again, plaintiffs have not alleged compliance with such requirement and seek to proceed with a 33 U.S.C. §1365(a) action under 28 U.S.C. §1331, without compliance with 33 U.S.C. §1365 (b), arguing that a "Savings Clause," 33 U.S.C. §1365(e) authorizes their so proceeding. As with the discussion of the 42 U.S.C. §300j-8(a) action above, 33 U.S.C. §1365(e)

merely preserves rights of action on theories other than 33 U.S.C. §1365(a), and does not give the Court jurisdiction over a 33 U.S.C. §1365(a) action under 28 U.S.C. §1331 without compliance with 33 U.S.C. §1365(b) as argued by plaintiffs. The Court has no subject matter jurisdiction over plaintiffs' claims based on 33 U.S.C. §1251, et seq.

II

Non-statutory Theories

A

Count One

The claim asserted by plaintiffs in count one of their amended complaint is based on federal common law nuisance. As acknowledged by MSD in their briefing on their motion to dismiss, there exists at least one exception to the abolition of the concept of "federal common law" in *Erie R.R. Co.* v. *Thompkins,* 304 U. S. 64, 58 S. Ct. 817 (1938). That exception arises in dealing "with air and water in their ambient or interstate aspects," *Illinois* v. *City of Milwaukee, Wisconsin* (1972), 406 U. S. 91, 92 S. Ct. 1385, 1392. It is on this exception that plaintiffs base their claim in count one of the amended complaint.

It is observed that in *Illinois* v. *Milwaukee, supra,* and in each case relied upon by the Supreme Court in that decision, the action was brought be (sic) a State as plaintiff. Such is not the case in this action. To date, the federal common law concept of *Illinois* v. *Milwaukee, supra,* has not been extended beyond the abatement of public nuisances in interstate controversies where the complainant is a State. Plaintiffs by this action ask the Court to make such an extension. The Court declines to do so.

The rights discussed in *Illinois* v. *Milwaukee, supra,* are rights belonging to the offended State, not to various entities within that State. This is in part evidenced by the Supreme Court's comparing the rights involved there

with such issues as boundary disputes, 92 S. Ct. at 1393, and apportionment of interstate waters, 92 S. Ct. at 1394. Also relev ıt is that the Court there, in announcing the exception to the abolition of federal common law, relied considerably upon the plaintiff's being a State. The plaintiffs herein represent only a part of the interests of the State of Indiana and even less of the interests of the other States they seek to represent by their class action allegations.

As the rights sought to be enforced by plaintiffs in count one of their amended complaint do not exist in favor of plaintiffs, the Court has no jurisdiction to adjudicate such claims.

B

Counts Three, Four and Five

The claims asserted by plaintiffs in these counts of the amended complaint are based upon non-federal common law theories. As the Court has no jurisdiction over the federal law claims of the amended complaint, the Court has no pendant jurisdiction over counts three, four and five. It appearing that plaintiffs are citizens of the State of Indiana and that defendant Hess is a citizen of the State of Indiana, jurisdiction over the claims in these counts does not exist under 28 U.S.C. §1332. There appearing no jurisdictional base in this Court for those claims, the Court is without jurisdiction over the subject-matter of counts three, four and five of the amended complaint in this action.

III

RULING

The Court is without subject-matter jurisdiction over any of the claims set forth in plaintiffs amended complaint in this action. Accordingly, that amended complaint is hereby DISMISSED on all theories and as to all parties. If

no further amended complaint is filed herein by March 23, 1978, this action will be deemed dismissed without prejudice on all theories and as to all parties without further action of the Court.
Dated: March 7, 1978.

(s) Cale J. Holder, Judge
United States District Court

ENTRY FOR MARCH 23, 1978
HON. CALE J. HOLDER, JUDGE

Based upon the Court's entry of March 7, 1978, there being no amended complaint filed herein by the plaintiffs, this case is hereby DISMISSED without prejudice on all theories and as to all parties.
Copy to:

Thedore Lockyear
555 Sycamore St.
Evansville, Ind. 47708

Wood, Goldberg, Pedley & Stansbury
2800 First National Tower
Louisville, Kentucky 40202

Fred P. Bamberger
708 Hulman Bldg.
Evansville, Ind. 47708

Robert G. Breetz
3400 First National Tower
Louisville, Kentucky 40202

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 78-1578

CITY OF EVANSVILLE, INDIANA, et al., - *Plaintiffs-Appellants*

v.

KENTUCKY LIQUID RECYCLING, INC., et al., - - - - - *Defendants-Appellees*

Appeal from the United States District Court
for the Southern District of Indiana
Evansville Division
No. EV 77-76-C—Cale J. Holder, Judge

ARGUED OCTOBER 24, 1978—DECIDED AUGUST 9, 1979

Before SPRECHER, TONE, and BAUER, *Circuit Judges.*

TONE, *Circuit Judge.* Three Indiana municipal corporations that use water from the Ohio River bring this action to recover damages incurred because of defendants' discharges of contaminants into the river from Kentucky. The most important question on this appeal is whether plaintiffs have stated a claim over which the district court had jurisdiction. We hold that a claim is stated under the federal common law of nuisance and that the court had jurisdiction pursuant to 28 U.S.C. § 1331.

Plaintiffs are Evansville, Indiana, the water works department of that city, and Mount Vernon, Indiana. Defendants are Kentucky Liquid Recycling, Inc., three of its employees, and Louisville and Jefferson County Metropolitan Sewage District. Plaintiffs allege that Kentucky Liquid Refining discharged toxic chemicals into the sewer system of the sewer district, and that the sewer district in turn discharged these chemicals into the Ohio River, from which plaintiffs draw water into their treatment plants. As a result of these discharges, it is alleged, plaintiffs incurred unusual treatment expense and other expenses, which they seek to recover as damages. They also seek punitive damages. Plaintiffs seek to represent a class of similarly situated municipalities and water treatment facilities, for whom similar relief is asked.

Although inartfully stated, several theories of federal jurisdiction are discernible from the amended complaint: (1) jurisdiction under 28 U.S.C. § 1331 over implied rights of action under (a) § 13 of the Rivers and Harbors Act, 33 U.S.C. § 407, (b) the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251, *et seq.*, and (c) the Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.*; (2) jurisdiction under the citizen suit provisions of the latter two statutes; and (3) jurisdiction under 28 U.S.C. § 1331 over a right of action under the federal common law of nuisance. Plaintiffs also assert state law claims, which, diversity of citizenship being lacking, must rest on pendent jurisdiction.[1]

In dismissing the amended complaint for lack of subject matter jurisdiction,[2] the district court held that violation of § 13 of the Rivers and Harbors Act did not give rise to a private right of action. The possibility of implying a right of action under the other two Acts was not discussed; and, viewing the notice requirements for citizen suits to enforce the requirements of the other two Acts as jurisdictional prerequisites, the court found jurisdiction lacking because of plaintiffs' admitted failure to comply with these requirements. The court rejected plaintiffs' contention that the savings clause of either statute in combination with 28 U.S.C. § 1331 provided an adequate basis for federal court jurisdiction. In addition, the court held that because plaintiffs were not states, jurisdiction could not be sustained under 28 U.S.C. § 1331 and the federal common law of nuisance. Having concluded that it had no jurisdiction over the federal claims, the court dismissed the pendent state law claims.

[1]Allegations of admiralty jurisdiction appearing in the complaint are not now relied on.

[2]The court did not rule on the alternative grounds for dismissal asserted in the sewer district's motion to dismiss, lack of jurisdiction over the person and improper venue. *See* Rule 12(b)(2) and (3), Fed. R. Civ. P.

I.

Rivers and Harbors Act

We agree with the district court that a private right of action should not be inferred under § 13 of the Rivers and Harbors Act,[3] which does not expressly create one.[4]

[3]33 U.S.C. § 407:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited . . . from the shore, wharf, manufacturing establishment or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; . . . .

[4]Whether plaintiffs have an implied cause of action under the statute is not a question of jurisdiction. *Burks* v. *Lasker*, ___ U. S. ___, ___ & n.5, 99 S. Ct. 1831, 1836 & n.5 (1979). Therefore, if the implied right of action under discussion had been the only right asserted, the complaint should have been dismissed for failure to state a claim on which relief could be granted. Rule 12(b)(6), Fed. R. Civ. P.

The Supreme Court has recently made it clear that when Congress does not expressly create a private cause of action, an intent to do so is not lightly to be inferred. *Touche Ross & Co.* v. *Redington,* ___ U. S. ___, 47 U.S.L.W. 4732 (1979); *Shiffrin* v. *Bratton,* ___ U. S. ___, 47 U.S.L.W. 3825 (1979) (vacating and remanding for further consideration in light of *Touche Ross); see Cannon* v. *University of Chicago,* ___ U. S. ___, 99 S. Ct. 1946, 1967-1968 (majority opinion), 1968 (Rehnquist, J., concurring), 2985 (Powell, J., dissenting) (1979); *Chrysler Corp.* v. *Brown,* ___ U. S. ___, ___, 99 S. Ct. 1705, 1725 (1979). (Referring to the four factors stated in *Cort* v. *Ash,* 422 U. S. 66 (1975), the Court in *Touche Ross* explained that although each is "relevant," they are not necessarily entitled to equal weight, and, moreover,

> [t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose, see 422 U.S., at 78—are ones traditionally relied upon in determining legislative intent.

47 U.S.L.W. at 4736. The Court also said,

> To the extent our analysis in today's decision differs from that of the Court in [*J. I. Case* v.] *Borak,* [377 U. S. 426 (1964)], it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today.

Touche Ross v. *Redington, supra,* 47 U.S.L.W. at 4737 (citing *Cannon).*

Even before these recent Supreme Court decisions, the Third Circuit refused to infer a private right of action

from sections of the Rivers and Harbors Act that are analogous for present purposes,[5] and district courts reached the same conclusion with respect to § 13.[6]

The first factor listed in *Cort* v. *Ash* is whether the plaintiff is

> "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff?

422 U. S. at 78. Referring to this factor in *Cannon,* the majority said,

> the Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large.

99 S. Ct. at 1954-1955 n.13; *see also Touche Ross* v. *Redington, supra,* 47 U.S.L.W. at 4735. The duties created by the provision relied on by plaintiffs in this case are for the benefit of the public at large.[7]

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[5] *Red Star Towing and Transportation Co.* v. *Department of Transportation of the State of New Jersey,* 423 F. 2d 104, 105 & n.3 (3d Cir. 1970).

[6] *E.g., Township of Long Beach* v. *City of New York,* 445 F. Supp. 1203, 1211-1212 (D. N.J. 1978); *Parsell* v. *Shell Oil Co.,* 421 F. Supp. 1275, 1277-1280 (D. Conn. 1976), *aff'd sub nom. East End Yacht Club, Inc.* v. *Shell Oil Co.,* 573 F. 2d 1289 (2d Cir. 1977).

[7] Plaintiffs' status as municipalities or a municipal agency is immaterial. For the language of the statute no more evidences an intent to "especially" benefit a class of municipalities or their agents than a class of private parties generally. Indeed, the Supreme Court has noted that "a principal beneficiary of the [Rivers and Harbors] Act, if not the principal beneficiary, is the [Federal] Government itself." *Wyandotte Transportation Co.* v. *United States,* 389 U. S. 191, 201 (1967).

As for the second *Cort* v. *Ash* factor, neither party cites any legislative history that might shed light on Congress' intent.[8]

The third factor, the consistency of a private right of action with "the underlying purposes of the legislative scheme," *Cort* v. *Ash, supra,* 422 U. S. at 78, is not helpful to plaintiffs here. Section 17 of the Act, 33 U.S.C. § 413, expressly delegates enforcement of the provisions of § 13 to the Department of Justice; and § 16 of the Act, 33 U.S.C. § 411, authorizes the district courts to award one-half of any criminal fines imposed on violators of § 13 to "persons giving information which shall lead to conviction."[9] While a private right of action would not be inconsistent with either of these provisions, both suggest that Congress intended to leave primary enforcement of the provision of the Act to the Department of Justice. *Cf. Red Star Towing* v. *Department of Transportation, supra,* 423 F. 2d at 105 & n.3.

The fourth *Cort* v. *Ash* factor seems to cut both ways, for the cause of action asserted here, although perhaps "one traditionally relegated to state law," is not "in an area basically the concern of the States." 422 U. S. at 78.

No one factor is controlling. Here the first, and arguably, the third factors weigh against implication of a private right of action; the second and fourth are at best only neutral. The central inquiry is Congressional intent, *Touche Ross* v. *Redington, supra,* 47 U.S.L.W. at 4736, and given the "stricter standard for the implication of private

[8]As noted in *Cannon,* "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." 99 S. Ct. at 1956.

[9]"[E]very court which has considered the question has denied to private plaintiffs the right to bring an action under the [Rivers and Harbors] Act to recover in a *qui tam* action the percentage of the fine which they might have been entitled to receive as informers if an offense had been prosecuted to conviction." *Parsell* v. *Shell Oil Co., supra,* 421 F. Supp. at 1279 (collecting cases, *id.* n.9).

causes of action," *id.* at 4737, established in the Supreme Court's most recent decisions in this area, we think the evidence insufficient to support the conclusion that Congress intended to create a private right of action under § 13 of the Rivers and Harbors Act.[10]

II.

Federal Water Pollution Control Act

Relying primarily on *National Resources Defense Council* v. *Callaway,* 524 F. 2d 79 (2d Cir. 1975), plaintiffs contend that the district court erred in holding that jurisdiction was lacking under the Federal Water Pollution Control Act Amendments[11] because they had failed to comply with the notice provisions of § 505.[12] More specifically, plain-

[10]We note also that the conduct of which plaintiffs complain may fall within the language of the statute excepting from its general prohibition "refuse . . . flowing from streets and sewers and passing therefrom in a liquid state, ..." 33 U.S.C. §407, quoted in note 3, *supra; see United States* v. *Dexter Corp.,* 507 F. 2d 1038 (7th Cir. 1975).

[11]The question is whether a right of action exists. *See* note 4, *supra.*

[12]33 U.S.C. § 1365:

(a) Except as provided in subsection (b) of this section, any citizen [defined in § 505(g), 33 U.S.C. § 1365(g)] may commence a civil action on his own behalf—

(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator [of the Environmental Protection Agency] where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The [United States] district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(Footnote continued on following page)

tiffs contend that the district court had jurisdiction of their FWPCA claims under 28 U.S.C. § 1331 by operation of the "savings clause" contained in § 505.[13]

In the cited case and an earlier case[14] the Second Circuit joined the District of Columbia Circuit, *Natural Resources Defense Council* v. *Train,* 510 F. 2d 692, 698-703 (1975), in holding that an action could be maintained against an administrative official despite the plaintiff's failure to comply with the FWPCA's 60-day notice requirement. We declined to follow the latter decision in *City of Highland Park* v. *Train,* 519 F. 2d 681, 693 (1975), *cert. denied,* 424 U. S.

(Footnote continued from preceding page)

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right[,]

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

[13]"Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ." 33 U.S.C. § 1365(e).

[14]*Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation,* 508 F. 2d 927, 938-939 & n.62 (2d Cir. 1974), *vacated* for reconsideration in light of *Aberdeen & Rockfish R.R. Co.* v. *SCRAP,* 422 U. S. 289, (1975) (National Environmental Policy Act holding), 423 U. S. 809 (1975).

927 (1976), a case arising under the Clean Air Amendments of 1970, 42 U.S.C. §§ 1857a, *et seq.* In any event, these three decisions of other circuits are inapplicable here. In each, the court's focus was on whether it had jurisdiction,[15] since the Administrative Procedure Act, 5 U.S.C. § 702, provided for review of final agency actions. In none of these cases did the court consider the propriety of implying an independent private right of action under the FWPCA. Compare *Chrysler* v. *Brown, supra,* 99 S. Ct. at 1725. In the case at bar the APA is of course inapplicable; any private right of action based on the FWPCA, other than that conferred by the citizen suit provision, must be inferred from the Act itself.

Plaintiffs' failure to comply with the notice requirement precludes reliance on § 505(a) as a basis for the action. *E.g., Commonwealth of Massachusetts* v. *United States Veterans Administration,* 541 F. 2d 119, 121 (1st Cir. 1976). Furthermore, even if the requisite notice had been given, § 505(a) would not have authorized plaintiffs' claim. That provision authorizes a civil action against a party "alleged to be in violation" of effluent standards or limitations prescribed under the Act or an order of the Administrator or a state with responsibility under the Act. It does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past or for recovery of damages. The legislative history of the provision leaves little doubt that neither class actions nor actions for damages were contemplated:

> Section 505 does not authorize a "class action." Instead, it would authorize a private action by any citizen or citizens acting on their own behalf. Questions with

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[15]The view of most circuits at the time was that § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-704, provided an independent jurisdictional basis for judicial review of final agency action. The Supreme Court held otherwise in *Califano* v. *Sanders,* 430 U. S. 99, 107 (1977).

> respect to traditional "class" actions often involve: (1) identifying a group of people whose interests have been damaged; (2) identifying the amount of total damage to determine jurisdiction qualification; and (3) allocating any damages recovered. None of these is appropriate in citizen suits seeking abatement of violations of water pollution control requirements. It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damges.[16]

Thus, unless plaintiffs can establish some other basis for this claim, the district court properly dismissed it.

Failure to comply with the notice provisions of § 505(b) does not foreclose any other right to relief a plaintiff might have. The "savings clause," § 505(e), 33 U.S.C. § 1365(e), expressly preserves any such rights. *Cf. City of Highland Park* v. *Train, supra,* 519 F. 2d at 691-693; *see also Illinois* v. *Milwaukee,* ____ F. 2d ____ (7th Cir. 1979) (holding that

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[16]S. Rep. No. 92-414, 92d Cong., 1st Sess. 81, reprinted in [1972] U. S. Code cong. & Ad. News 3746-3747; *see also* H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 133, reprinted in 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972* 753, 820 (1973) (noting that although the courts would be authorized to impose civil fines under § 309(d), 33 U.S.C. § 1319(d), "[t]he penalties imposed would be deposited as miscellaneous receipts in the treasury and not be recovered by the citizen bringing the suit"). With one exception significant here, § 505 as adopted "is the same as the comparable provision of the Senate Bill [S. 2770] and the House Amendment [H.R. 11896]. . . ." S. Rep. No. 92-1236, 92d Cong., 2d Sess. 145 (Conference Report), reprinted in [1972] U. S. Code Cong. & Ad. News 3776, 3823. In both the Senate bill and the House bill, §505 contained numerous exceptions to the 60-day waiting period required after notice. In the bill as adopted all of these exceptions but two were eliminated. *Ibid.*

the Federal Water Pollution Control Act does not preclude a federal common law action under 28 U.S.C. § 1331). The "savings clause" preserves rights "under any statute or common law" but does not itself create any right. Assuming that the Act itself is within the term "any statute" (*but see* note 20 and accompanying text, *infra*), still no right exists under the Act unless it can be inferred, because none is expressed.

We therefore turn again to the standards discussed in Part I, above, to determine whether such a right should be inferred. Recognizing that "[t]he most accurate indicator of the propriety of implication of a cause of action" is the language of the statute, *Cannon* v. *University of Chicago, supra,* 99 S. Ct. at 1954-1955 n.13, we shall again proceed through the still relevant *Cort* v. *Ash* factors.

Plaintiffs cite no particular provision of the Act as supporting their claim for relief, but presumably they rely on § 301, 33 U.S.C. § 1311, which proscribes the discharge of any pollutant except in compliance with the provisions of the Act.[17] Neither that section nor any other section of the Act contains any suggestion that Congress intended to confer a benefit or right on any particular segment of the public.

Moreover, it is significant that the Act contains a section specifically addressed to private rights of action, § 505, which not only provides for citizen suits but also contains, in subsection (e), a savings clause providing that nothing in the section is to affect any right "under any statute or common law." Congress having thus specifically addressed the subject of private remedies, it is reasonable to assume that it said all that it intended on that subject. *Cf. Touche Ross* v. *Redington, supra,* 47 U.S.L.W. at 4735.

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[17]For a discussion of the provisions of the Act *see Illinois* v. *Milwaukee,* ____ F. 2d ____ (7th Cir. 1979).

Section 505 evidences a Congressional intent to carefully channel public participation in the enforcement of the Act.[18] Before commencing a citizen suit the plaintiff must give notice not only to the alleged violator but also to the Administrator and the state in which the violation occurs.[19] If either the Administrator or the state initiates adequate enforcement proceedings, the private action is foreclosed, although the complainant is authorized to intervene "as of right." § 505(b), 33 U.S.C. § 1365(b).

The legislative history of the Act contains no specific answer to the question of whether § 301 creates a private right of action. The reference to § 505 in the Senate Report on S. 2770, quoted above, in referring, *inter alia,* to damage actions, interprets the statutory phrase "under any statute or common law" as "under any other law." Even if this was intended only as paraphrase, it suggests that a right of action for damages must be found outside the Act

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[18]*See also* § 101(e), 33 U.S.C. § 1251(e): "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes." *See generally Citizens for a Better Environment* v. *EPA*, ___ F. 2d ___ (7th Cir. 1979); S. Rep. No. 92-1236, 92d Cong., 2d Sess. 100 (Conference Report), reprinted in [1972] U. S. Code Cong. & Ad. News 3776, 3777; S. Rep. No. 92-414, 92d Cong., 1st Sess., 12, 79-82, reprinted in [1972] U. S. Code Cong. & Ad. News 3668, 3679, 3745-3747; H. Rep. No. 92-911, 92d Cong., 2d Sess. 79, 132, reprinted in 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972* 753, 766, 819-821 (1973).

[19]*See, e.g.,* S. Rep. No. 92-414, 92d Cong., 1st Sess. 79-80, reprinted in [1972] U. S. Code Cong. & Ad. News 3668, 3745: "In order to further encourage and provide for agency enforecement the Committee has added a requirement that prior to filing a petition with a court, a citizen or group of citizens would first have to serve a notice of intent to file such action on the Federal and State Water Pollution Control Agency and the alleged polluter."

itself.[20] And Congress' rejection of all but two of the proposed exceptions to the requirement of a 60-day waiting period for a citizen suit, *see* note 16, *supra,* reinforces the evidence in § 505 itself of an intent to circumscribe private rights of action under the FWPCA.

What we have said about § 505 is also applicable with respect to the third factor identified in *Cort* v. *Ash,* namely, "is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" 422 U. S. at 78. Section 505 expresses Congress' judgment as to the kind and extent of private enforcement of the FWPCA. In a private suit under § 505(a) a court, at the behest of a private plaintiff, may enforce compliance with effluent standards and limitations, require the Administrator to perform a duty to act, and impose civil penalties under § 309(d), 33 U.S.C. § 1319(d). Implication of a private remedy for damages under § 301 would be inconsistent with the congressional purpose implicit in the Act of encouraging private participation in the enforcement of the Act within the channels expressly provided. *Cf. Touche Ross* v. *Redington, supra,* 47 U.S.L.W. at 4735-4736; *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U. S. 453, 457-458 (1974); *T.I.M.E., Inc.* v. *United States,* 359 U. S. 464, 470-471 (1959).

The enforcement scheme is adequate without an inferred private right of action. The Administrator of the EPA is given broad authority to enforce the provisions of the Act; states assuming discharge permit authority are required to

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[20]This language in the Senate Report might also have been intended to state what was meant by the phrase "any statute or common law" rather than as a mere paraphrase. Thus, § 505(e) would preclude the inference of any Congressional intent to create a private right of action for damages under other provisions of the FWPCA. Nevertheless, for purposes of analyzing the *Cort* v. *Ash* factors we assume that the statement is only a paraphrase of the statutory language.

demonstrate adequate state law authority to insure compliance. If a state fails to enforce the Act, the Administrator may do so, and, in the case of repeated failures to enforce the Act, the Administrator may resume direct authority for issuance of permits in that state. These enforcement procedures are reinforced by the citizen suit provisions of § 505, which also authorizes the award of attorney's fees and litigation costs to citizen plaintiffs.

We conclude that plaintiffs have not carried their burden of establishing that Congress intended to create a private right of action for damages against a violator of the FWPCA in favor of a person injured by pollutant discharges.

The amended complaint does not state a claim under the FWPCA on which relief could be granted.

III.

Safe Drinking Water Act

Plaintiffs recognize in their brief that their assertion of a right of action under the Safe Drinking Water Act is subject to the same analysis as their claim to a right of action under FWPCA.[21]

We do not, however, even find it necessary to apply that analysis, because defendants' alleged conduct does not even arguably violate the Safe Drinking Water Act. That Act authorizes the Administrator of the EPA to prescribe maximum contaminant levels in drinking water and specific treatment techniques to reduce the level of contaminants in drinking water.[22] With an exception not relevant here,[23]

[21]The Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.*, contains, in 42 U.S.C. § 300j-8, a notice provision comparable to that of § 505 of the FWPCA.

[22]*See* 42 U.S.C. § 300g-1; for an overview of the statutory scheme *see Environmental Defense Fund* v. *Costle*, 578 F. 2d 337, 339-340, 342-344 (D.C. Cir. 1978) (Leventhal, J.).

[23]*See* 42 U.S.C. § 300h (underground injection of contaminants that may endanger drinking water supplies).

the Act does not purport to regulate discharges of pollutants. It focuses on "public water systems," *see, e.g.*, 42 U.S.C. § 300g,[24] and attempts to insure that such systems provide drinking water that meets minimal safety standards. *See generally* H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess., reprinted in [1974] U. S. Code Cong. & Ad. News 6454, 6456-6462.[25] Plaintiffs point to no provision of the Act within which defendants' conduct even arguably falls; we have found none. If this were the only basis asserted for a federal cause of action subject to the district court's jurisdiction, plaintiffs' claim would be "wholly insubstantial and frivolous" and therefore within the narrow category of claims that should be dismissed for lack of federal jurisdiction. *Hagans* v. *Lavine*, 415 U. S. 528, 536-543 (1974); *Bell* v. *Hood*, 327 U. S. 678, 682-683 (1946).

IV.

Federal Common Law

Plaintiffs' assertion of a right of action under the federal common law of nuisance and federal jurisdiction over such a claim under 28 U.S.C. § 1331,[26] is well founded.

Defendants argue that, as the district court held, under *Illinois* v. *Milwaukee*, 406 U. S. 91, 100 (1972), only a state may file such an action. Plaintiffs do not seek to represent

[24]Public water system is defined as follows:

> [A] system for the provision to the public of piped water for human consumption, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals.

42 U.S.C. § 300f(4).

[25]"The purpose of the legislation is to assure that water supply systems serving the public meet minimum national standards for protection of public health." H.R. Rep. No. 93-1185, *supra*, reprinted in [1974] U. S. Code Cong. & Ad. News, *supra*, at 6454.

[26]"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . , and arises under the . . . , laws, . . . of the United States". 28 U.S.C. § 1131(a).

the "quasi-sovereign interest," *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237 (1907), or the "ecological rights," *Texas* v. *Pankey*, 441 F. 2d 236, 240 (10th Cir. 1971), of the State of Indiana. Because they are not states, they cannot represent the interests of any other state, *see* Rule 23(a)(3), Fed. R. Civ. P., and they do not seek to do so. They seek only to recover for themselves and other similarly situated municipal bodies damages for expenses they incurred because of defendants' discharges of toxic chemicals into drinking water supplies.

Since it was the Supreme Court's opinion in *Illinois* v. *Milwaukee* that firmly established the existence of a federal common law of nuisance governing interstate water pollution, we take that opinion as our text in determining the content and scope of that law. *See also Texas* v. *Pankey*, *supra*, 441 F. 2d at 239-242. The Court did not address itself in *Illinois* v. *Milwaukee* to the question of whether parties other than states were protected by, or could invoke, that law, since the only plaintiff in that case was a state. The Court's opinion does, however, provide guidance for resolution of the question before us.[27]

The Court held that "laws" in 28 U.S.C. § 1331(a) includes federal common law as well as statutory law, 406 U. S. at 100, and declared that there is a federal common law of nuisance applicable to interstate water pollution. *Id.* at 103. Referring to the problem of water apportionment, the Court said

[27]*Compare* P. Bator, P. Mishkin, D. Shapiro, and H. Wechsler, *The Federal Courts and the Federal System* 806 (2d ed. 1973) ("Justice Douglas' opinion [in *Illinois* v. *Milwaukee*, 406 U. S. 91 (1972)] casts no light on the question whether federal common law governs suits to abate interstate pollution brought by private parties") *with* Note, Federal Common Law and Interstate Pollution, 85 Harv. L. Rev. 1439, 1439 (1972) ("The holding in that case [*Illinois* v. *Milwaukee*, 406 U. S. 91 (1972)] goes farther than the holding in the [*Texas* v.] *Pankey* [441 F. 2d 236 (10th Cir. 1971)] case . . . largely because the . . . Court indicated that federal common law-making power should be exercised in any interstate nuisance suit, regardless of the character of the parties, . . .).

> Rights in interstate streams, like questions of boundaries, "have been recognized as presenting federal questions." *Hinderlider* v. *LaPlata Co.*, 304 U. S. 92, 110 [(1938)]. The question of apportionment of interstate waters is a question of "federal common law" upon which state statutes or decisions are not conclusive.

406 U. S. at 105 (footnote omitted).[28] The Court's footnote 6 is particularly suggestive of the correct resolution of the issue in the case at bar:

> Thus, it is not only the character of the parties that requires us to apply federal law. . . . As Mr. Justice Harlan indicated for the Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 421-427 [(1964)], where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. . . . Certainly these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four States.

Id. at 105 (citations omitted).

Whatever the result should be when the plaintiff is a private party or when no interstate effects are alleged,[29]

[28]In *Hinderlider*, the plaintiff was not a state but a ditch company complaining of Colorado's interference with its rights to draw water from the LaPlata River. Colorado defended on the ground that its action was authorized by an interstate compact approved by Congress.

[29]In *Committee for Jones Falls Sewage System* v. *Train*, 539 F. 2d 1006 (4th Cir. 1976) (in banc), a divided court refused to extend *Illinois* v. *Milwaukee* to an action brought by an association of community organizations and citizens in which there was no interstate effect. Even though state plaintiffs were present in *Reserve Mining Co.* v. *EPA*, 514 F. 2d 492, 520, 521 (8th Cir. 1975) (in

(Footnote continued on following page)

there can be little doubt that the reasons the Supreme Court found compelling for declaring a federal common law of interstate water pollution are applicable here. The plaintiffs are municipal or public corporations, subdivisions of the state, that were required to spend public funds because of pollution of an interstate waterway by acts done in another state. The interests of the state in this interstate pollution dispute are implicated in the same way such interests were implicated in *Illinois* v. *Milwaukee.*[30]

The sewer district asserts that a passage from *New Jersey* v. *New York,* 345 U. S. 369 (1953), quoted in *Illinois* v. *Milwuakee, supra,* 406 U. S. at 96-97, supports the view that only a state may maintain a suit based on the federal common law. The portion of the passage relied on is as follows:

> The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed

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(Footnote continued from preceding page)

banc), the court held *Illinois* v. *Milwaukee* inapplicable because no interstate effects were alleged. *See also Parsell* v. *Shell Oil Co.,* 421 F. Supp. 1275, 1281 (D. Conn. 1976), *aff'd sub nom. East End Yacht Club* v. *Shell Oil Co.,* 573 F. 2d 1289 (2d Cir. 1977). *But see Stream Pollution Control Board* v. *United States Steel Corp.,* 512 F. 2d 1036, 1039-1040 & n.9 (7th Cir. 1975); *Ira S. Bushey & Sons* v. *United States,* 346 F. Supp. 145 (D.Vt. 1972), *aff'd,* 487 F. 2d 1393 (2d Cir. 1973), *cert. denied,* 417 U. S. 976 (1974).

[30] *Cf. Hinderlider* v. *LaPlata River & Cherry Creek D. Co.,* 304 U. S. 92, 110 (1938) (interstate water apportionment); *see also Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 238 (1907) (implicitly assuming that even a private party might file suit to enjoin interstate air pollution); *Committee for James Falls Sewage System* v. *Train, supra,* 539 F. 2d at 1009, n.8. Originating in Pennsylvania, the Ohio River is the boundary between Ohio and West Virginia, Ohio and Kentucky, Indiana and Kentucky, and Illinois and Kentucky, and empties into the Mississippi River. Each of these states has an interest in the use of the river, but the laws of one state cannot control the use of the river by citizens of other states. *See Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398, 427 (1964) (*Hinderlider* "implies that no State can undermine the federal interests in equitably apportioned interstate waters even if it deals with private parties").

> area of the Delaware River and its tributaries and depend upon those waters. If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth . . . .

As the rest of the passage quoted in *Illinois* v. *Milwaukee, supra,* 406 U. S. at 97, demonstrates, the language will not bear the construction asserted by the sewer district:

> Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions. An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

The issue in *New Jersey* v. *New York* was whether Philadelphia should be permitted to intervene in an original action in the Supreme Court in which Pennsylvania was already a party. What the Court said in addressing that issue has no bearing on whether a party other than a state can maintain a federal common law nuisance action in a district court.

So far there is little authority on the question we decide. At least one district court has held that a municipality can state a claim for relief under the federal common law of interstate water pollution. *Township of Long Beach* v. *City of New York,* 445 F. Supp. 1203, 1214 (D.N.J. 1978). Both the Second and Third Circuits have indicated that the United States can state a claim for relief under the federal common law.[31]

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[31] *United States* v. *Ira S. Bushey & Sons,* 346 F. Supp. 145 (D. Vt. 1972) (Oakes, J.), *aff'd,* 487 F. 2d 1393 (2d Cir. 1973), *cert. denied,* 417 U. S. 976 (1974); *United States* v. *Stoeco Homes,*

(Footnote continued on following page)

Defendants also contend that plaintiffs' request for damages rather than injunctive relief somehow precludes the district court's exercise of jurisdiction. None of the defendants cites any authority for that proposition, and we have discovered none.[32] We have held that plaintiffs are appropriate parties to maintain the cause of action asserted. The question of what relief, if any, they may be entitled to is independent of the court's power to hear and decide the merits of the claim. *See Davis* v. *Passman*, ___ U. S. ___, 99 S. Ct. 2264, 2274 n.18 (1979).[33] Whether or not defendants have breached any obligations for which they should be held liable to plaintiffs will be determined by judge-made rules. The consequences of any breach of duty imposed by the courts are necessarily also determined by the courts. *Cf. International Brotherhood of Electrical Workers* v. *Foust*, ___ U. S. ___, 99 S. Ct. 2121, 2125

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498 F. 2d 597, 611 (3d Cir. 1974), *cert. denied*, 420 U. S. 977 (1975); *see also Stream Pollution Control Board* v. *United States Steel Corp.*, 512 F. 2d 1036, 1040 n.9 (7th Cir. 1975); *United States* v. *United States Steel Corp.*, 356 F. Supp. 556, 558 (N.D. Ill. 1973).

[32]The sewer district seems to assert that the Supreme Court's decision in *Illinois* v. *Milwaukee, supra,* establishes a request for equitable relief as a "criterion" for maintaining a claim under the federal common law of interstate water pollution. We disagree. Plaintiffs in that case sought equitable relief because of the nature of the claimed injury. *See Illinois* v. *Milwaukee, supra,* ___ F. 2d at ___. The Supreme Court's discussion of Illinois' right to maintain the action, therefore, focused on that type of claim. We find nothing in the opinion that supports the conclusion that equitable relief is exclusive or that a request for such relief is essential.

[33]Nor is the relief sought ordinarily determinative of whether a plaintiff has a cause of action. "If a litigant is an appropriate party to invoke the power of the courts, it is said that he has a 'cause of action' under the statute, and that this cause of action is a necessary element of his 'claim.' So understood, the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entiled to receive." *Davis* v. *Passman*, ___ U. S. ___, 99 S. Ct. 2264, 2274 (1979).

(majority opinion), 2128 (Blackmun, J., concurring) (breach of union's duty of fair representation) (1979). The remedies appropriate for the violation of duties imposed under the federal common law of water pollution will necessarily depend upon the facts in a particular case. *E.g., Illinois* v. *Milwaukee, supra,* ___ F. 2d at ___. We hold only that a request for damages does not preclude the exercise of jurisdiction of a claim arising under the federal common law of interstate water pollution.[34]

Accordingly, the district court had subject matter jurisdiction of plaintiffs' claim under the federal common law of interstate water pollution.[35]

V.

Venue and Personal Jurisdiction

Since we should affirm a district court judgment on any ground supported by the record on appeal, our disposition of the federal common law claim would ordinarily lead us to consider any other substantial ground urged for affirm-

[34]Additional support for the conclusion we reach on this point may be found in the Supreme Court's references to the law of "public nuisance." *Illinois* v. *Milwaukee, supra,* 406 U. S. at 106, 107; *see also Vermont* v. *New York,* 417 U. S. 270, 275 n.5 (1974). For in such suits plaintiffs found to meet the "particular injury" requirements for maintaining a suit for public nuisance traditionally have been awarded damages or equitable relief depending upon the circumstances. *See generally* Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997 (1966); Prosser, *Handbook of the Law of Torts* 602-606 (4th ed. 1971). "Once the existence of a nuisance is established, the plaintiff normally has three possible remedies: an action for the damages which he has suffered, equitable relief by injunction, and abatement by self help." *Id.* at 602.

[35]We express no judgment on the extent to which the sewer district may have a sovereign immunity defense since neither party has adequately briefed the issue, both stating, in effect, that the question does not affect jurisdiction. *But cf. United States* v. *Testan,* 424 U. S. 392 (1976).

ance.[36] Nevertheless, in this case we think it wise to defer consideration of the sewer district's contention that the Indiana long-arm statute,[37] applicable here by force of Rule 4(e), Fed. R. Civ. P.,[38] is insufficient to permit the

[36]The sewer district's improper venue claim is adequately answered by our decision in *Illinois* v. *Milwaukee, supra,* ___ F. 2d at ___, rejecting a similar argument. *Leroy* v. *Great Western United Corp.*, ___ U. S. ___, 47 U.S.L.W. 4844 (1979), decided after our decision in *Illinois* v. *Milwaukee, supra,* does not require a contrary conclusion.

In *Great Western,* the Court noted that if it is "not clear that the claim arose in only one specific district a plaintiff may choose between those two . . . districts that with approximately equal plausibility may be assigned as the locus of the claim." 47 U.S.L.W. at 4847. But in the case before it the Court found that there was "only one obvious locus. . . ." *Ibid.* Interstate water pollution disputes, however, fall within the first category. *See Illinois* v. *Milwaukee, supra,* 406 U. S. at 108, n.10; *Illinois* v. *Milwaukee, supra,* ___ F. 2d at ___. For, in such disputes, proof of injury to the complainant is a significant aspect of the litigation. *See generally Illinois* v. *Milwaukee, supra,* ___ F. 2d at ___. The defendant's actions will commonly occur in a district other than that in which the injury is suffered, but it cannot be said that the "bulk of the relevant evidence and witnesses," *Leroy* v. *Great Western, supra,* 47 U.S.L.W. at 4847, will be located in either district.

[37]Trial Rule 4.4, Indiana Rules of Trial Procedure, reprinted in Ind. Stat. Ann.: Court Rules, Book 1 (Burns), in relevant part, is as follows:

> (a) *Acts serving as a basis for jurisdiction.* Any person or organization that is a non-resident of this state, . . . , submits to the juridiction of the courts of this state as to any action arising from the following acts committed by him or his agent:
>
> (1) doing any business in this state;
>
> (2) causing personal injury or property damage by an act or omission done within this state;
>
> (3) causing personal injury or property damage in this state by an occurrence, act or omission done outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue or benefit from goods, materials, or services used, consumed, or rendered in this state; . . .

[38]*E.g., Illinois* v. *Milwaukee, supra,* ___ F. 2d at ___ n.3; *Lakeside Bridge & Steel Co.* v. *Mountain State Construction Co.*, 597 F. 2d 596, 598 (7th Cir. 1979).

exercise of personal jurisdiction, a contention the trial judge found it unnecessary to reach because of his holding on subject matter jurisdiction. If the issue were governed by Illinois law, our decision in *Illinois* v. *Milwaukee, supra,* ___ F. 2d ___, sustaining in personam jurisdiction, would be controlling. Indiana's long-arm statute is different from that of Illinois, however. The parties have cited no Indiana decision construing the relevant provisions of the statute, and our research has revealed none. Although federal district courts sitting in Indiana have stated that the "Indiana long-arm statute was intended to extend personal jurisdiction of courts sitting in this state, . . ., to the limits permitted under the due process clause of the fourteenth amendment," *Oddi* v. *Mariner-Denver, Inc.*, 461 F. Supp. 306, 308 (S.D. Ind. 1978),[39] the specific statutory provisions appear to be more limited.

Subsection (2) of the Indiana long-arm statute refers to "an act or omission done within this state." We cannot determine whether the Indiana courts will conclude that this phrase includes only acts physically done within the state or also includes acts physically done outside the state but causing some injury within it; either construction is possible.[40] Subsection (3) of the Indiana statute suggests

[39]*Valdez* v. *Ford, Bacon, and Davis, Texas,* 62 F.R.D. 7, 10, 14 (N.D. Ind. 1974); *Byrd* v. *Whitestone Publications, Inc.*, 27 Ind. Dec. 617, 619 (S.D. Ind. 1971); *see also Pearson* v. *Furnco Construction Co.*, 563 F. 2d 815, 819 (7th Cir. 1977). *But cf. Chulchian* v. *Franklin*, 392 F. Supp. 203, 205 (S.D. Ind. 1975).

And it does seem that that was their intent: "The adoption of this rule will expand the in personam jurisdiction of the courts of this state to the limits permitted under the Due Process Clause of the Fourteenh Amendment." Civil Code Study Commission, Comments to Rule 4.4, quoted in *Valdez* v. *Ford, Bacon, supra,* 62 F.R.D. at 10. The Comments are reprinted in W. Harvey, 1 *Indiana Practice,* 298-305 (1969).

[40]The Indiana statute is based in part on the Illinois long-arm statute, Ill. Rev. Stat. ch. 110, § 17; the New York long-arm statute, 7B McKinney's Consolidated Laws of New York § 302, is also based in part on the Illinois statute. Yet, the courts of Illinois and New

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the narrower construction, since the broader construction would create considerable overlap between the provisions of subsections (2) and (3). Nevertheless, if it is correct that the legislature intended to expand Indiana state court jurisdiction to the limits of the due process clause, a broad construction may be warranted.[41] This issue of Indiana statutory law should be decided in the first instance by a district judge sitting in Indiana, who will be more familiar with Indiana law and practice than we are.[42]

(Footnote continued from preceding page)

York have come to opposite conclusions concerning the scope of virtually identical phrases in their long-arm statutes. *Compare Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 435-436, 176 N. E. 2d 761, 762-763 (1961) (construing the phrase "tortious act within this state") *with Longines-Wittnauer Watch Co.* v. *Barnes & Reinecke, Inc.*, 15 N.Y.S. 2d 443, 460, 261 N. Y. S. 2d 8, 21, 209 N. E. 2d 68, 77, *cert. denied sub nom. Estwing Mfg. Co.* v. *Singer*, 382 U. S. 905 (1965) (construing the phrase "tortious act within the state"). *See also Harvey* v. *Chemie Grunenthal*, 354 F. 2d 428, 431 (2d Cir.), *cert. denied*, 384 U. S. 1001 (1965) (construing the New York long-arm statute).

[41]Also, it seems apparent that the three subsections were not intended to be mutually exclusive. All three might be applicable, for example, in a products liability action against an Illinois manufacturer that has no place of business in Indiana but regularly sells its products there.

[42]Only the sewer district presses this claim on appeal. The other defendants moved to dismiss the amended complaint "for improper venue and failure to comply with the provision[s] of . . . 28 U. S. Code 1391(a) and . . . 28 U. S. Code Section 1341(b) . . . ," [R. 88] but in their memorandum in support of the motion seemed to argue in addition that the court had no personal jurisdiction, concluding with the following statement:

> Plaintiffs have not, and cannot, allege facts sufficient to support venue or personal jurisdiction in this Court, and the . . . Complaint must be dismissed.

[R. 91-92.] In responding to this motion to dismiss, however, plaintiffs only addressed the venue contention. If on remand these defendants do in fact raise the issue, the court should consider whether it has been preserved.

Whether or not these defendants have waived the objection by failure to raise it, Rule 54(b), Fed. R. Civ. P., and 28 U.S.C. § 1292(b) provide available avenues for review of the court's decision on the personal jurisdiction issue as it relates to the sewer district should the court make the requisite findings.

VI.

State Law Claims

We affirm the district court's dismissal of the three state law claims. "[I]t is federal common law and not state statutory or common law that controls in this case," *Illinois* v. *Milwaukee, supra,* ____ F. 2d at ____ n.53; *see Illinois* v. *Milwaukee, supra,* 406 U. S. at 103 & n.5, 107 & n.9.[43]

Accordingly, the district court's judgment is affirmed in part and reversed and remanded in part for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[43]Although federal common law controls, federal statutes as well as state statutory and common laws are nonetheless highly relevant. *Illinois* v. *Milwaukee, supra,* 406 U. S. at 103 & n.5, 107 & n.9; *Illinois* v. *Milwaukee, supra,* ____ F. 2d at ____; *cf. United States* v. *Kimbell Foods,* ____ U. S. ____, 47 U.S.L.W. 4342, 4345-4349 (1979); *see generally* Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797 (1957).

IN THE

Supreme Court of the United States

October Term, 1979

NO. 79-726

KENTUCKY LIQUID RECYCLING, INC., LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, DONALD EUGENE DISTLER, CHARLES W. HORN, JR., JOSEPH ALFRED HESS, JR.,
Petitioners,

-vs-

CITY OF EVANSVILLE, INDIANA CITY OF MT. VERNON, INDIANA, THE WATER WORKS DEPARTMENT OF THE WATER WORKS DISTRICT OF THE CITY OF EVANSVILLE, Individually and as representative for and on behalf of class similarly situated,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Lockyear, Barber & Kornblum
THEODORE LOCKYEAR
STEVE BARBER
JAMES A. KORNBLUM
555 Sycamore Street
Evansville, IN 47708
Phone: (812) 422-1199

The Law Department of
City of Evansville, IN
JOHN C. COX
Corporate Counsel
522 Main Street
Evansville, IN 47708
Phone: (812) 423-4216

Attorneys for Respondents

Unigraphic, Inc., 1401 N. Fares Ave., Evansville, Ind. 47711. Phone 424-3680

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IN THE

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CITY OF EVANSVILLE, INDIANA, CITY OF MT. VERNON, INDIANA, THE WATER WORKS DEPARTMENT OF THE WATER WORKS DISTRICT OF THE CITY OF EVANSVILLE, Individually and as representative for and on behalf of class similarly situated,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The Respondents, City of Evansville, Indiana, City of Mt. Vernon, Indiana, The Water Works Department of the Water Works District of the City of Evansville, individually and as representative for and on behalf of class similarly situated, respectfully pray that this Court deny Petitioners' Petition for a Writ of Certiorari to review the judge-

ment of the United States Court of Appeals for the Seventh Circuit in *City of Evansville, Indiana, et al. v. Kentucky Liquid Recycling, Inc., et al.*, No. 78-1578, entered August 9, 1979, for the reason that there are no conflicts between the Circuit Courts of Appeals and for the further reason that the judgment of the Court of Appeals below is correct.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *City of Evansville, Indiana, et al. v. Kentucky Liquid Recycling, Inc., et al.*, 604 F.2d 1008 (7th Cir. 1979). (See also: Appendix B to Petitioners' brief, p. 7a). The opinion and judgment of the United States District Court for the Southern District of Indiana, entered March 7, 1978, and March 23, 1978, respectively, are not reported but are found in the Appendix to Petitioners' brief. (See Appendix A, p. 1a and 6a, respectively.)

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit was rendered and entered on the 9th day of August, 1979. The Petition for Writ of Certiorari was filed by Petitioners on November 6, 1979, alleging jurisdiction under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Did the Amended Complaint filed by the Respondents in the District Court below, alleging, *inter alia*, a cause of action based upon federal common law of nuisance resulting from the alleged intentional dumping of highly

poisonous and carcinogenic chemicals, octaclorocyelopentene and hexachlorocyclopentadiene, state a claim for relief and provide the District Court with jurisdiction under the Federal Question Statute, 28 U.S.C. § 1331 (a)?

STATUTORY PROVISIONS INVOLVED

The Respondents alleged jurisdiction in the District Court below, *inter alia*, by virtue of the Federal Question Statute, 28 U.S.C. § 1331 (a) which provides:

> "The District Court shall have original jurisdiction of all civil action wherein the matter and controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

STATEMENT OF THE CASE

The Respondents, City of Evansville, Indiana, and City of Mt. Vernon, Indiana, are municipal corporations duly organized and existing under virtue of the laws of the State of Indiana. The Respondent, Water Works Department of the Water Works District of the City of Evansville, is a legal entity which operates and maintains the waterworks system of the waterworks district of the City of Evansville, Indiana, and is responsible for purification of water obtained from the Ohio River and for the distribution of said water to the residents of said district for consumption. The Respondent, City of Mt. Vernon, Indiana supplies purified water to the residents of Mt. Vernon, Posey County, Indiana.

At some time in March of 1977, the Petitioner, Kentucky Liquid Recycling, Inc., acting by and through its agents, servants and employees, and the Petitioners, Donald Eugene Distler, Charles W. Horn, Jr. and Joseph Alfred Hess,

Jr., caused the discharge of two highly toxic chemicals into the Petitioner, Louisville and Jefferson County Metropolitan Sewer District's system. That thereafter a portion of said highly toxic chemicals entered the Ohio River and subsequently entered the Respondents' water treatment facilities. As a further result of the entries of said highly toxic chemicals into the Louisville and Jefferson County Metropolitan Sewer System, the Petitioner, Louisville and Jefferson County Metropolitan Sewer District, commenced discharging untreated and/or adequately treated sewage, along with said poisons, into the Ohio River at its Louisville, Kentucky plant. As a result of the presence of said highly toxic chemicals, pollutants and sewage in the water of the Ohio River drawn by the Respondents for residential consumption, the Respondents incurred substantial costs in unusual and extraordinary treatment expenses to remove said contaminants.

On July 13, 1977, the Respondents filed in the District Court their complaint seeking compensatory and punitive damages. Said complaint was amended on September 20, 1977, alleging, *inter alia*, a claim for relief under the federal common law of nuisance and further alleging the District Court had jurisdiction of said claim for relief pursuant to the Federal Question Statute, 28 U.S.C. § 1331. On October 20, 1977, the Petitioner, Louisville and Jefferson County Metropolitan Sewer District filed its Motion to Dismiss Respondents' Amended Complaint pursuant to Rule 12 (b) (1), (2) and (3) of the Federal Rules of Civil Procedure. The issues were thereafter briefed and on March 7, 1978, the District Court found that it lacked subject matter jurisdiction and Respondents' Amended Complaint was dismissed as to all Petitioners.

Thereafter a timely appeal was taken to the United States Court of Appeals for the Seventh Circuit, which reversed, in part, the decision of the District Court below holding that the Respondents' Amended Complaint stated a claim for relief under federal common law nuisance and

that the District Court had jurisdiction pursuant to the Federal Question Statute, 28 U.S.C. § 1331.

REASONS FOR DENYING THE WRIT

A.

THERE IS ABSOLUTELY NO CONFLICT BETWEEN THE CIRCUIT COURT OF APPEALS AND THE RULING BELOW

The Petitioners attempt to invoke the jurisdiction of this Court for review on Writ of Certiorari alleging a conflict between the Circuit Courts of Appeals, and alleging that the Court of Appeals for the Seventh Circuit has decided a question of federal law which should be resolved by this Court. The gravaman of the Petitioners' assertion that the opinion below was erroneous is twofold:

1) That a municipality may not maintain an action based upon federal common law nuisance; and

2) That damages will not lie for a violation of federal common law nuisance.

The Petitioner's cases, cited as constituting a conflict between the various Court of Appeals, when analyzed within the context of the reasons they contend the decision below is incorrect, demonstrate that the perceived conflict between the Courts of Appeals is non-existent. The fallacy of the Petitioners' approach to the issues presented is that their cases cited to not conflict for any reason claimed as constituting an error in the decision below.

In support of Petitioners' argument that there is a conflict between the Circuits, their principle reliance is upon a District Court's decision in *Parsell v. Shell Oil Company*, 421 F. Supp. 1275 (D.C. Conn. 1976). That District Court's opinion was affirmed, *sub. nom*, by the Second Circuit in an unpublished opinion. *East End Yacht Club v. Shell Oil*

Company, 573 F. 2d 1289 (2nd Cir. 1977). However, the basis of the affirmance, the particular errors argued on appeal and the issues resolved in that appeal are unavailable and not cited by the Petitioners. This Court is asked to speculate that the affirmance was on the basis of the District Court's reasoning below. Because the decision in *Parsell* involved an intrastate pollution and non-governmental entities, the case is simply inapplicable and clearly distinguishable from the case at bar. At most, the Petitioners can only claim an alleged conflict between the District Court's opinion and the Seventh Circuit's opinion in the instant case and this would not be a basis for invoking the jurisdiction of this Court on a Writ of Certiorari.

The only other case cited by the Petitioners for a supposed conflict is *Committee for the Consideration of the Jones Falls Sewage System v. Train*, 539 F. 2d 1006, (4th Cir. 1976). The Petitioners rely upon *Train* for the proposition that a private party may not maintain an action based upon the theory of federal common law nuisance. However, in *Train*, the Court specifically stated:

> "It is not essential that one or more states be formal parties if the interest of the states are sufficiently implicated." *Id.* at 1009, f.n. 8.

In this case, the Respondents are not private parties but are governmental entities charged with providing clean and safe

drinking water to its citizens under state statute.[1] In fact, in *Parsell* the Court also noted the significance of the fact that there was no "governmental entities" involved. *Parsell v. Shell Oil Company*, 421 F. Supp. 1275, 1280 (D.C. Conn. 1976).

There is no question presented in *Train* whether an action for damages is maintainable under the theory of federal common law of nuisance since the plaintiff merely was seeking injunctive relief to abate the nuisance. In neither *Parsell* nor *Train* was there interstate pollution alleged, as in the instant case; both of those cases involved allegations of only intrastate pollution. In neither *Parsell* nor *Train* was there a governmental entity maintaining the suit; both cases involved private parties.

Even though the cases relied upon by the Petitioners involved private parties; even though the cases relied upon by the Petitioners involved intrastate, not interstate pollution, as alleged in this case; even though the Fourth Circuit specifically rejected the argument that a State is a necessary formal party to an action based upon federal common law nuisance; and even though the Petitioners can only speculate as to a supposed conflict with the Second Circuit; the Petitioners would have this Court believe that there is, somehow, a conflict between the various Courts of Appeals. The Petitioners own characterization of the Fourth Circuit's decision *i.e.*, "(T)he Fourth Circuit declined to extend the application

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1 The Indiana States statutes, I.C. 19-3-25-1, *et seq.*, provided for the creation and existence of the Respondent, The Water Works Department of the Water Works District of the City of Evansville. Acts 1927, Ch. 164, § 1, Repealed, Acts 1978, P.L. 2, § 1919 and Acts 1979, P.L. 160, § 1. In addition, I.C. 16-1-26-4 provides, in part, that no offering for public consumption shall be made of any drinking water which shows bacteriological or chemical content deleterious to public health. Acts 1949, Ch. 157, § 1753.

of the doctrine in a case involving *private plaintiffs* in an *intrastate* pollution controversy," (Petition p. 9), demonstrates that there is no conflict where there is a governmental entity maintaining the suit in an interstate pollution controversy and explains why Petitioners' cases are distinguishable upon their individual facts. (Emphasis added.)

B.

THE DECISION BELOW IS A NARROW HOLDING DECIDED CORRECTLY

Because the District Court dismissed the Respondents' Amended Complaint upon a Motion to Dismiss for lack of subject matter jurisdiction, the Petitioners admit the factual allegations of the Respondents' Amended Complaint.[2] Under said allegations the Respondents would prove at the trial of this cause that the Petitioners caused the discharge of two highly toxic chemicals, octaclorocyelopentene and hexachlorocyclopentadiene, known carcinogens, into the Ohio River, an interstate waterway. They would further admit that these poisons ultimately flowed down the Ohio River and caused Respondents, municipal corporations and water treatment facilities, extraordinary expenses in the purification of water for their customers in Evansville and Mt.

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[2]The law is well settled in ruling on a Motion to Dismiss the complaint is construed in the light most favorable to the plaintiff and its allegations of fact are taken as true, *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). Furthermore, the complaint should not be dismissed unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of their claim which would entitle them to relief, *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. 3d. 2d 80 (1957).

Vernon, Indiana.

This Court, when faced with a similar factual situation as Respondents' Amended Complaint, that is, interstate pollution, fashioned federal common law nuisance in *Illinois v. Milwaukee*, 406 U.S. 91, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972). The basic premise of this decision was stated by Mr. Justice Douglas, speaking for a unanimous Court, as follows:

> "It is not uncommon for Federal Courts to fashion federal law where federal rights are concerned . . . When we deal with air and water and their ambient or interstate aspects, there is a federal common law." *Id.* at 406 U.S. 91, 103.

Without this fundamental base there would effectively be insured a mishmash of state enforcement and litigation in protection of our interstate waterways. The Ohio River interstate waterway originates in Pennsylvania and forms the boundaries between Ohio and West Virginia, Ohio and Kentucky, Indiana and Kentucky, Illinois and Kentucky and flows into the Mississippi River. As the river forms the boundaries of and abbuts six different states during its course, the federal common law nuisance policy of providing a "uniform rule of decision" is as applicable in the instant case as it was in the *Illinois* decision. *Id.* at 105, f.n. 6. The injury complained herein originated in the Commonwealth of Kentucky and caused damage to interest of the State of Indiana.

The Petitioners first question whether a municipality may maintain an action based upon federal common law nuisance. Unlike the characterization by Petitioners of the opinion below, the Seventh Circuit Court of Appeals has not opened the way for private individuals to state a federal common law nuisance claims. The Respondents in this action are not private individuals but are municipal corporations, subdivisions of the State of Indiana and public cor-

porations required to expend public funds for the services they seek to provide the residents of their districts. Thus, the holding is quite a narrow extension, if indeed an extension at all, of *Illinois v. Milwaukee*.[3]

No decision cited by the Petitioners in any way contravenes the holding or logic of the Seventh Circuit below that a municipality has a right of action under federal common law nuisance. In the only other case deciding this specific issue, *Township of Long Beach v. City of New York*, 445 F. Supp. 1203 (D.C. N.J. 1978), the court specifically stated:

> "Defendants herein first argue that plaintiff cannot bring this action since it is not a state. It is agreed that the decision of *Illinois v. Milwaukee, supra*, should not be extended to encompice an action by a private person. In response to this contention, it should be noted that plaintiff is not a private person or entity but, rather, is a township." *Id*. at 1213.

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[3]The holding of this Court in *Illinois v. Milwaukee* was stated as: "The question is whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of §1331 (a). We hold that it does; . . ." *Id*. at 406 U.S. 91, 98-99. It should also be noted that this Court on the same day in deciding *Illinois v. Milwaukee*, also decided *Washington v. General Motors Corporation*, 406 U.S. 109, 92 S. Ct. 1396, 31 L. Ed. 2d 727 (1972) wherein it was stated: ". . . Moreover, citizens, states and local governments may initiate actions to enforce compliance with federal standards and to enforce other statutory and common-law rights." *Id*. at 406 U.S. 109, 115 f.n. 4.

Furthermore, in *Parsell v. Shell Oil Company*, 421 F. Supp 1275 (D.C. Conn. 1976), the Court spoke in terms of governmental entities. The Petitioners and the Respondents both include governmental entities. Therefore, the cases cited by the Petitioners involving private parties are clearly inapplicable to the situation at hand.

In addition, a number of courts have held that federal common law nuisance actions are available to another non-state plaintiff, the United States. See *United States v. Stoeco Homes, Inc.*, 498 F. 2d 597 (3rd Cir. 1974), cert. denied, 420 U.S. 927, 95 S. Ct. 1124, 43 L. Ed. 2d 397 (1975); *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145 (D.C. Vt. 1972), aff'd. 487 F.2d 1393 (2nd Cir. 1973). See also, *Stream Pollution Control Board of the State of Indiana v. United States Steel*, 512 F. 2d 1036 (7th Cir. 1975), wherein although not precisely passing upon whether a cause of action had been stated, the court stated:

> "While United States Steel argues that the application of this federal common law depends on the existence of a conflict between sovereigns, we note that, with one exception, the federal district courts have permitted the federal government to utilize this federal common law as a basis for pollution - abatement actions. *Id*. at 512 F.2d 1036, 1040, f.n. 9.

Purely and succinctly stated, the argument by the Petitioners on the advisability of allowing private parties to assert federal common law nuisance claims is inapplicable here. As stated in the Court of Appeals in the decision below:

> "Whatever the result should be when the plaintiff is a private party or when no interstate effects are alleged, there can be little doubt that the reasons the Supreme Court found

> compelling for declaring a federal common law of interstate water pollution are applicable here. The plaintiffs are municipal or public corporations, subdivisions of the state, that were required to spend public funds because of pollution of an interstate waterway by acts done in another state. The interests of the state in this interstate pollution dispute are implicated in the same way such interests were implicated in *Illinois v. Milwaukee.*" *City of Evansville, Indiana, v. Kentucky Liquid Recycling, Inc.*, 604 F. 2d 1008, 1018 (7th Cir. 1979).

The decision below merely implements the policy of *Illinois v. Milwaukee.* The distinction between a state plaintiff and a governmental unit plaintiff is simply non-existent and the Petitioners have failed to disclose any authority in support of such a distinction.

The second area which the Petitioners assert for granting the Writ of Certiorari is the alleged error of the Court of Appeals ruling below holding that the Respondents' prayer for damages is not inconsistent with a claim for relief under federal common law nuisance. The holding of the Court of Appeals below was a very narrow one. The Court stated that:

> "We hold only that a request for damages does not preclude the exercise of jurisdiction of a claim arising under the federal common law of interstate water pollution." *City of Evansville, Indiana, v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1019 (7th Cir. 1979).

This position has been accepted by the United States District Court for the Northern District of New York *In the Matter of Oswego Barge Corp.*, 439 F. Supp. 312 (D.C. N.Y. 1977).

The Seventh Circuit in deciding the instant case reasoned that this Court's decision in *Illinois v. Milwaukee* focused only upon the type of claim presented in that case, *i.e.* abatement. The Court noted:

> "We find nothing in the opinion *Illinois v. Milwaukee* that supports the conclusion that equitable relief is exclusive or that a request for such relief is essential." *City of Evansville, Indiana, v. Kentucky Liquid Recycling, Inc.*, 604 F. 2d 1008, 1019, f.n. 32.

The Court then concluded:

> "Additional support for the conclusion we reach on this point may be found in the Supreme Court's references to the law of 'public nuisances.' *Illinois v. Milwaukee, supra,* 406 U.S. at 106, 107, 92 S. Ct. 1385; See also *Vermont v. New York,* 417 U.S. 270, 275 N.5, 94 S. Ct. 2248, 41 L. 3d. 2d 61 (1974). For in such suits plaintiffs found to meet the 'particular injury' requirements for maintaining a suit for public nuisance traditionally have been awarded damages or equitable relief depending on the circumstances. See generally, W. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997 (1966); W. Prosser, *Handbook of the Law of Torts,* 602-606 (4th Ed. 1971). 'Once the existence of a nuisance is established, the plaintiff normally has three possible remedies: an action for damages which he has suffered, equitable relief by injunction, and abatement by self help.' *Id.* at 602." *Id.* at 604 F. 2d 1008, 1019 f.n. 34.

In fact, the decision of *Illinois v. Milwaukee* spoke

specifically to this particular point noting:

> "Yet the remedies which Congress provides are not necessarily the only federal remedies available. It is not uncommon for federal courts to fashion federal law where rights are concerned." *Illinois v. Milwaukee,* 406 U.S. 91, 103.

To recognize an action based upon federal common law nuisance without recognizing a right of action for damages would be to apply a doctrine without any teeth in it. If the position of the Petitioners in applying a federal right of action to abate a nuisance with no remedy for damages is accepted, such a position would destroy the underlying basis in this Court's holding in *Illinois v. Milwaukee;* that is, to provide a uniform standard of conduct in which polluters must be held accountable and to provide governmental entities a remedy other than self help. If the only remedy available under federal common law nuisance was a remedy for abatement, an individual or corporation could easily create a nuisance and voluntarily abate the nuisance and leave the damaged parties without a remedy to recover damages caused by the nuisance. This Court recognized the remedies appropriate for a violation of a duty imposed under federal common law nuisance would necessarily depend upon the facts in a particular case. *Illinois v. Milwaukee,* 406 U.S. 91, 108, 92 S. Ct. 1385, 1395 (1972). The Respondents, whose duties it is to provide drinking water to its citizens, should have the right to recover its extraordinary expenses caused by the Petitioners' conduct as the Court of Appeals correctly held. If the rule were otherwise, a state could have substantial *portions of its terrain or its citizens* injured and left without a remedy. The pollution having ceased, what is their only remedy -- self help?

Lastly, it should be noted this Court recently held in *Davis v. Passman,* _____ U.S. _____ , 99 S. Ct. 2264,

_____L. Ed. 2d _____, (1979), that:

> ". . . the question of whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Id.* at 2274.

In other words:

> ". . .(a) *cause of action* is a question of whether a particular plaintiff is a member of a class of litigants that may, as a matter of law, appropriately invoke the power of the Court; and relief is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all . . ." *Id.* at 2274, f.n. 18.

Hence, the question of the appropriateness of the relief requested by the Respondents has no bearing upon their stating a valid cause of action based upon federal common law nuisance, and is, therefore, premature at this time as the decision below in the District Court was based upon a lack of subject matter jurisdiction.

CONCLUSION

Because the Petitioners have failed to demonstrate any conflict between the Circuit Courts of Appeals and the decision below and for the further reason that the United States Court of Appeals for the Seventh Circuit correctly reversed and remanded the instant action for trial in the District Court below, the Respondents herein respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

Lockyear, Barber & Kornblum
THEODORE LOCKYEAR
STEVE BARBER
JAMES A. KORNBLUM
555 Sycamore Street
Evansville, Indiana 47708
Telephone: (812) 422-1199

The Law Department of the
City of Evansville, Indiana
JOHN C. COX
Corporate Counsel
522 Main Street
Evansville, Indiana 47708
Telephone: (812) 423-4216

Attorneys for Respondents